

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

MAILED

DEC 23 2005

U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD C. WORRELL and
EDMUND L. WHITEMAN

Appeal No. 2006-0082
Application No. 09/495,257

ON BRIEF

Before CAROFF, PAK, and KRATZ, Administrative Patent Judges.
CAROFF, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 7-21, all the pending claims in appellants' application.

The claims before us are directed to an elastic fabric which has been sanded with a microfinishing film to improve the hand or softness of the fabric.

The two independent claims on appeal, claims 7 and 8, are illustrative of appellants' claimed invention:

7. A fabric made according to the process for improving the hand of elastic fabrics comprising the steps of:

contacting a surface of an elastic fabric with a microfinishing film to abrade the fibers on at least one surface of the fabric.

8. A sanded elastic fabric having a hairiness value of less than about 0.1 across its width when measured with a Zweigle T690 Hairiness Tester.

The prior art references relied upon by the examiner on appeal are:

Moore	T 962,002	Sept. 6, 1977
Rock et al. (Rock)	5,547,733	Aug. 20, 1996

The following rejections are before us for review:

1. Claims 8-21 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite.
2. Claims 7-12 and 14-20 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Rock.
3. Claims 8-12 and 14-21 stand rejected under 35 U.S.C. § 102(b)/103(a) as being anticipated by, or obvious from, Rock.
4. Claim 13 stands rejected under 35 U.S.C. § 103 (a) for obviousness in view of Rock taken with Moore.

We have carefully considered the issues in this case in light of the evidentiary record and the respective positions advanced by the examiner and the appellants.

Having done so, we shall affirm the examiner's decision with respect to each of the rejections over prior art, but we reverse the rejection under 35 U.S.C. § 112.

The basis for our decision follows:

Rejection 1

With regard to the 35 U.S.C. § 112 rejection, the examiner posits that merely reciting a physical characteristic (hairiness value), rather than a chemical or structural feature, renders a claim indefinite.

We disagree, at least with regard to the present claims. Independent claim 8 does not "merely" set forth a physical property. Rather claim 8 is directed to a distinct physical object, namely a "sanded elastic fabric". That the article may be defined in broad terms, or may not be patentably distinguishable from those of the prior art, does not necessarily cause a claim to be indefinite.

Moreover, as pointed out by the appellants, a hairiness value apparently quantifies a particular structural attribute, i.e. the fuzziness of the fabric surface.

For the foregoing reasons, the subject rejection is reversed.

Rejections 2 and 3

We shall treat these rejections together since they are each based upon the same reference. We find it more elucidating to discuss these rejections on a claim-by-claim basis.

First, independent claim 7 can be characterized as a "product-by-process" claim. As such, it is not particularly limited by the recitation of the specific manner by which the product is produced. In such cases, the product is unpatentable if it reasonably appears to be the same as, or obvious from, a prior art product, even if the prior art product is made by a different process. In re Thorpe, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985). This appears to be the case here since the product of Rock, like that claimed by appellants, constitutes an elastic fabric having a surface which has been "sanded" or abraded to impart softness to the fabric.

Moreover, with regard to the claimed product, appellants' specification (page 8) indicates that the grade of a "microfinishing film" is critical in obtaining satisfactory results. Therefore, since the grade of film is not claimed, claim 7 reads on a fabric which is patentably indistinguishable from the sanded fabric of Rock.

Second, with regard to independent claim 8, we agree with the examiner that "less than about 0.1" reads on hairiness values near 0.1, such as the values which appellants' specification (page 11) shows are exhibited by conventionally sanded products, e.g. a conventional value as low as 0.125 which, rounded off to the nearest tenth, is 0.1. Cf. Titanium Metals Corp. of America v. Banner, 778 F.2d 775, 783, 227 USPQ 773, 779 (Fed. Cir. 1985).

Moreover, we find the evidence of nonobviousness presented in appellants' specification unconvincing for two additional reasons. One, the reported results do not

appear to represent a direct comparison with the closest prior art, namely the exemplified fabric of Rock. · Two, the reported results do not represent a true side-by-side comparison since a different sanding roller configuration and speed was used for conventional sanding as distinguished from the conditions used when sanding with a microfinishing film.

With regard to claim 21, we find that those of ordinary skill in the art would have been motivated by the teachings of Rock (column 4, lines 36-38) to optimize the softness or hairiness of a fabric used in a garment. Accordingly, the claimed hairiness value at least would have been prima facie obvious absent a convincing showing of new or unexpected results.

All of the remaining claims subject to rejections 2 and 3 have not been separately argued. Accordingly, they stand or fall with independent claim 8.

Rejection 4

With regard to this rejection, appellants do not challenge the examiner's rationale for combining Moore with Rock. Accordingly, we shall affirm the rejection for the reasons set forth on page 6 of the examiner's answer.

For all of the foregoing reasons, the decision of the examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

Marc L. Caroff
MARC L. CAROFF
Administrative Patent Judge

MARC L. CAROFF //
Administrative Patent Judge


CHUNG K. PAK
Administrative Patent Judge

Peter F. Kratz
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